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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. QUINTON D. ROBINSON, Defendant and Appellant.	C044126 (Super. Ct. No. 02F00954)

A jury convicted defendant Quinton D. Robinson of one count of possessing a firearm as a convicted felon. (Pen. Code, § 12021, subd. (a)(1).) Defendant received an aggravated, "second strike"-doubled sentence of seven years.

On appeal, defendant contends the trial court erred by denying his motion to suppress, by failing to instruct on its own initiative concerning evidence of other crimes and the definition of "firearm," and by refusing to strike his prior "strike" conviction. Defendant also claims his counsel rendered ineffective assistance. We disagree with these contentions and affirm the judgment.

BACKGROUND

While on bike patrol in the early evening of January 22, 2002, Sacramento Police Officers Galipeau and McLaughlin stopped defendant for riding his bicycle on the K Street Mall in violation of city code.

Officer McLaughlin obtained defendant's identification card, began writing a bicycle citation, and ran a records check for outstanding warrants over his radio.

The records check indicated that defendant had a couple of warrants. The two officers made eye contact and began to move toward defendant to handcuff him. At this point, defendant fled and the chase was on.

Two K Street Mall security officers joined the pursuit. Toward the end of it, Officer Galipeau saw a gun in defendant's right hand. The gun resembled a Glock semiautomatic handgun, and Galipeau tried to alert the other officers by yelling "Gun."

Eventually, Galipeau maneuvered toward defendant, pointed his service weapon at him, and ordered defendant to drop his gun. Defendant complied. Defendant was subdued following a brief struggle with the officers. Officer McLaughlin then secured the gun defendant had been carrying, a semiautomatic Glock 9-millimeter handgun containing five rounds.

No latent fingerprints were found on the handgun or the rounds. The two mall security officers testified they never saw a gun in defendant's hands. However, one of these officers did see a gun drop from defendant's side; the other saw a gun on the ground near defendant immediately after he was subdued.

DISCUSSION

1. *Motion to Suppress*

Defendant claims the trial court erroneously denied his motion to suppress evidence. Defendant concedes he was properly detained for a citation, but maintains the detention became unconstitutionally prolonged. We disagree.

In reviewing a denial of a motion to suppress evidence, we defer to the trial court's factual findings where supported by substantial evidence. We determine independently, however, whether, on the facts found, the challenged search or seizure was reasonable under constitutional standards. (*People v. Avila* (1997) 58 Cal.App.4th 1069, 1073-1074; U.S. Const., 4th Amend.)

A police officer may routinely run a warrant check on a traffic infraction detainee, provided the check does not unreasonably prolong the detention (i.e., the check must approximate, align with, the time required to conduct the particular traffic stop). (*People v. McGaughran* (1979) 25 Cal.3d 577, 584, 587; *People v. Brown* (1998) 62 Cal.App.4th 493, 498; *Williams v. Superior Court* (1985) 168 Cal.App.3d 349, 357-359.) Such a check does not equate to a prohibited, unrelated "general crime investigation." (See *ibid.*)

At the hearing on the motion to suppress, Officer Galipeau testified that he and Officer McLaughlin contacted dispatch regarding defendant at 5:06 p.m. It is unclear whether the officers told dispatch they were *about* to detain defendant or whether they *had just* detained him. Officer McLaughlin began writing the citation and running the records check, while

Galipeau spoke generally with defendant. Defendant fled from the officers at 5:17 p.m. The records check, but not the writing of the citation, had been completed when defendant fled.

Officer Galipeau testified that he and Officer McLaughlin routinely stop people riding their bikes on the K Street Mall five to 10 times a day; these stops average 10 to 15 minutes. A typical stop encompasses counseling about the citation, writing the citation, and running the records check. The officers run a records check on every person they cite.

The trial court found the following facts. At most, the detention lasted 11 minutes before defendant fled. This is within the 10 to 15-minute average duration of a bicycle stop, which encompasses counseling, citing and record-checking. Officer McLaughlin was writing the citation and running the records check simultaneously, but he did not have enough time to complete the citation before defendant fled.

These facts are supported by substantial evidence. Based on them, we conclude independently that defendant's detention was not unreasonably prolonged. Consequently, the trial court did not err in denying defendant's motion to suppress.

2. Failure to Instruct on Definition and Element of Firearm

Defendant contends the trial court erred by failing to instruct on its own initiative on the definition of "firearm." This failure, defendant maintains, impermissibly removed from the jury's consideration the element of whether defendant possessed a *firearm.* We disagree.

The trial court instructed with CALJIC No. 12.44 that "Every person who, having previously been convicted of a felony, owns or has in his possession or under his custody or control *any pistol, revolver, or other firearm* is guilty of a violation of section 12021(a)(1) of the Penal Code, a crime." (Italics added.) As pertinent, the trial court added pursuant to CALJIC No. 12.44: "In order to prove the crime, each of the following elements must be proved: [¶] One, the defendant, the person previously convicted of a felony [a previously stipulated fact], had in his possession or had under his control a firearm, a Glock nine millimeter; and, [¶] Two, the defendant had knowledge of the presence of the firearm, a Glock nine millimeter."

Defendant argues that this instruction did not define the term "firearm"; the instruction did not set forth any definition that a "firearm includes a handgun" or that a "firearm includes a pistol, revolver, shotgun, or rifle." Instead, according to defendant, this instruction improperly directed the jury's verdict on the firearm element--i.e., the instruction directed the jury to find him guilty if he "had in his possession or had under his control a Glock 9mm."

Defendant is mistaken. The challenged instruction stated, as relevant, that defendant could be found guilty only if he possessed or controlled "any pistol, revolver, or other firearm," and that whether he possessed or controlled "a firearm, a Glock nine millimeter" were elements that had to be proved. Thus, the jury was instructed that a firearm included a pistol or revolver or other such firearm, and the jury had to

find whether the Glock nine millimeter was such a weapon. The specific reference to the "Glock nine millimeter" was a reference to the alleged firearm at issue, in line with the crime charged against defendant. In this way, it was unnecessary to further instruct with CALJIC No. 12.48, as defendant maintains. That instruction, as pertinent, simply describes a firearm as a weapon designed to expel through a barrel an exploded projectile.

Defendant also cites *People v. Runnion* (1994) 30 Cal.App.4th 852. But that decision supports our analysis. In *Runnion*, the element at issue was whether the defendant had used "a firearm." The court had instructed that "'[t]he word "firearm" includes handgun.'" (30 Cal.App.4th at p. 855.) In light of a trial exhibit--allegedly the gun used, resembling a handgun--the defendant in *Runnion* claimed this instruction amounted to a directed verdict on this element. (*Id.* at p. 854.) The *Runnion* court disagreed, concluding: "The [trial] court did not instruct the jury that a particular element had been established, as it would have done had it instructed the jury that [the gun exhibit in evidence] was a firearm or a handgun. Instead, the [trial] court merely, and correctly, instructed that the legal definition of a firearm included a handgun. The jury was left to determine whether [the exhibit], the item at issue in the case before them, was a handgun." (*Id.* at p. 856.)

Similarly, here the trial court did not instruct the jury that the Glock 9-millimeter was a firearm. Instead, the court

instructed that a firearm includes a pistol, revolver, or similar weapon, and the jury was left to determine whether the Glock 9-millimeter fit into this category.

3. *Failure to Instruct on Other Crimes Evidence*

Defendant contends the trial court erred by failing to give on its own initiative (sua sponte) an instruction limiting the use of the evidence of defendant's prior conviction and his outstanding warrants. Without such an instruction, defendant argues, the jury may have used this evidence to convict him improperly on the basis of his "bad" character. We disagree.

A trial court generally is under no duty to instruct on its own initiative on the limited use of evidence of past criminal conduct. (*People v. Carter* (2003) 30 Cal.4th 1166, 1197-1198; *People v. Collie* (1981) 30 Cal.3d 43, 64 (*Collie*); see also *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7; Evid. Code, § 355.) An exception to this general rule arises in "an occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose." (*Collie, supra,* at p. 64.) The general rule, not the exception, applies here.

Defendant was charged with being a *convicted felon* in possession of a firearm. (Pen. Code, § 12021, subd. (a)(1).) Obviously, the prosecution had to prove that defendant had a *felony conviction*, which it did via a stipulation presented just before closing argument. The stipulation stated simply that "[o]n or about May 22nd of 2000, defendant was convicted of a

felony." The felony conviction was therefore relevant, it had a specific purpose, and it was presented in a minimalist way.

The outstanding warrants were relevant as well. Citing the lack of fingerprint evidence on the gun and the rounds, the lack of any security videotape of the incident, and certain testimony from the security officers, the defense suggested that the Glock 9-millimeter was not defendant's. The warrants evidence played into this theory. Defendant fled immediately after the radio broadcast of the records check disclosed that he had a couple of warrants. This evidence suggested that defendant ran from the officers because he had the warrants rather than a gun. Defense counsel raised this theory in arguing to the jury.

Since the evidence of defendant's past criminal conduct was relevant, that evidence did not fit within the *Collie* exception requiring instruction on the court's own initiative. Consequently, the court did not err.

4. *Ineffective Assistance of Counsel*

In a related argument, defendant claims his counsel ineffectively represented him by failing to object to the warrants evidence, and by failing to request a limiting instruction regarding such evidence and the prior conviction evidence.

To demonstrate ineffective assistance, a defendant must show that his counsel performed unreasonably (i.e., below the prevailing professional standard), and that he was prejudiced as a result. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

As noted, the warrants evidence supported a reasonable defense theory that defendant fled from the officers because he had the warrants rather than a gun.

As for the limiting instruction, defense counsel reasonably may have concluded that such an instruction, coming from the trial judge, would unnecessarily highlight defendant's status as a felon while providing little benefit. (See *People v. Hawkins* (1995) 10 Cal.4th 920, 942.) Defense counsel wanted to use the warrants evidence for defense purposes. The prior conviction evidence was minimal and had a readily known, specific purpose. Any use of this other crimes evidence to view defendant as a "bad" character, defense counsel may have concluded, could best be countered in the less formal and less highlighted context of argument rather than instruction.

In the context of appellate review, we do not find any ineffective assistance.

5. *Prior Strike Conviction and Sumstine Motion*

Defendant contends the trial court erroneously denied, on procedural and substantive grounds, his *Sumstine* motion to strike his prior serious felony conviction. (*People v. Sumstine* (1984) 36 Cal.3d 909 (*Sumstine*).) In the motion, defendant claimed that this prior conviction, which was for robbery, resulted from a no contest plea that was not knowing, voluntary and intelligent because the court that had taken the plea misadvised him of the subsequent penal consequences that could flow from this "strike" conviction. We conclude the trial court

properly denied defendant's *Sumstine* motion on procedural grounds.

A *Sumstine* motion allows a defendant in a current case to attack collaterally the validity of a prior felony conviction if that conviction was obtained through a plea in which the defendant did not knowingly and voluntarily waive his *Boykin-Tahl* constitutional rights (i.e., the right to a jury trial, the right to confront his accusers, and the right to remain silent). (*Sumstine, supra,* 36 Cal.3d at pp. 914, 923; *People v. Allen* (1999) 21 Cal.4th 424, 426, 435, 439 (*Allen*); *Boykin v. Alabama* (1969) 395 U.S. 238 [23 L.Ed.2d 274]; *In re Tahl* (1969) 1 Cal.3d 122.)

Defendant's claim of error here--that the court that took his prior robbery plea misadvised him of the subsequent penal consequences of pleading to a strike prior (by suggesting that only a future "serious" felony could result in a doubled term, notwithstanding correct advice from defendant's counsel at the time that any second felony could be doubled)--does not implicate one of the *Boykin-Tahl* rights. As the People note, defendant's claim of error could not have been raised in a *Sumstine* motion. (See *Allen, supra,* 21 Cal.4th at pp. 426, 435, 439 [a *Sumstine* motion involves a collateral appellate attack that encompasses only an alleged deprivation of *Boykin-Tahl* constitutional rights].) Consequently, the trial court in the current case did not err in denying defendant's *Sumstine* motion.

Defendant's reliance on *People v. Witcher* (1995) 41 Cal.App.4th 223 does not change the equation. *Witcher* dealt

with so-called *Yurko* error. (*In re Yurko* (1974) 10 Cal.3d 857, 863.) *Yurko* and *Witcher* involve the context of a defendant who has admitted a prior conviction for sentencing purposes in the trial court, and who then challenges that admission on direct appeal. Before such an admission, a defendant must be advised of his *Boykin-Tahl* rights as a matter of constitutional law, and must be advised of the penal consequences that may flow from his admission as a matter of a judicially declared rule of criminal procedure. (*Yurko, supra,* 10 Cal.3d at pp. 863-864; *Witcher, supra,* 41 Cal.App.4th at pp. 226-227.) As noted, defendant's *Sumstine* motion alleges that he was misadvised of penal consequences when he pled no contest to his prior robbery charge. Such an allegation cannot procedurally be made in a *Sumstine* motion. A *Sumstine* motion involves a *collateral* appellate attack that encompasses only an alleged deprivation of *Boykin-Tahl* constitutional rights. (See *Allen, supra,* 21 Cal.4th at pp. 434-440.) A *Yurko-Witcher* claim of error, by contrast, involves a *direct* appellate attack that may be based not only on *Boykin-Tahl* grounds but on penal consequences grounds as well. Accordingly, *Witcher* is not relevant. Defendant's claim of error involving the misadvisement of penal consequences is relegated to the procedure of a habeas corpus writ rather than a *Sumstine* motion. (See *Allen, supra,* at pp. 429-430, 434-440.)

6. *Blakely v. Washington*

Defendant has filed a supplemental brief regarding the impact on his sentencing of a recent United States Supreme Court

decision, *Blakely v. Washington* (2004) 542 U.S. ___ [159 L.Ed.2d 403]. *Blakely* is an extension of *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435]. (*Blakely, supra,* 542 U.S. at ___ [159 L.Ed.2d at p. 412].) *Blakely* and *Apprendi* effectively concluded that under the Sixth Amendment right to trial by jury, any sentencing finding (other than a finding of a prior conviction) that could lead to a sentence greater than that which could be imposed based on what the jury found or on what the defendant admitted must be submitted to a jury and proved beyond a reasonable doubt.

The trial court here sentenced defendant to an upper term of three years on his conviction of being a felon in possession of a firearm (this term was doubled as a second strike conviction). Defendant has prior, separate convictions for petty theft, robbery, and sexual battery by restraint. He also has prior juvenile adjudications and prior arrests. The court selected the upper term "because of [defendant's] record of repeated crimes."

Central to the trial court's upper term analysis are defendant's *three prior convictions* which constitute defendant's most egregious "record of repeated crimes." A sentencing finding of prior convictions is not subject to *Apprendi* or *Blakely.* And only a single factor is needed to impose the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433-434.) Thus, to the extent the trial court's reference to a "record of repeated crimes" encompasses something other than prior convictions (e.g., arrests), it was harmless beyond a reasonable

doubt. (*Campbell v. Unites States* (6th Cir. 2004) 364 F.3d 727, 737-738 [*Apprendi* violations are subject to harmless-error analysis].) Accordingly, we find that nothing set forth in *Blakely* undermines the legality of defendant's upper term sentence.

DISPOSITION

The judgment is affirmed.

DAVIS, J.

We concur:

BLEASE, Acting P.J.

BUTZ, J.